I should like to add one or two general observations regarding applications for leave under section 68(1) (a) of the Act. When an application for leave to appeal may be made either to the High Court or to the Federal Court, it must not be made in the first instance to the Federal Court: Rule 58 of the Rules, unless perhaps where special circumstances make it impossible or impracticable to apply to the Court below. Once leave is obtained, notice of appeal with the endorsement "filed pursuant to leave of High/Federal Court granted on....." may be filed and served provided the time limited for appeal or any extended period as the Federal Court may have allowed has not yet expired.

The circumstances in which leave to appeal will be granted would include cases where the applicant is able to demonstrate a *prima facie* case of error (see (1907), 123 L.T. Jo 202) or if the question is one of general principle decided for the first time (*Ex.p. Gilchrist, re Armstrong*)[3] or a question of importance upon which further argument and a decision of the Federal Court would be to the public advantage (see per Bankes, L.J. in *Buckle* v. *Holmes*[4]. I confess that had it been necessary for me to decide whether leave should be given in this case, I would have required a great deal of persuasion to have answered this question in the affirmative.

Order accordingly.

Solicitors: *Azman, Davidson & Co.; Thevin Chandran Siva & Chong.*

K.L. H. v. GOVERNMENT OF MALAYSIA

[A.C.J. (Wan Hamzah J.) January 24, 1984]

[Kuala Lumpur – Civil Appeal No. 30 of 1983]

Revenue Law – Income Tax – Non-compliance with Income Tax Act, 1967, s.83(3) – Employer bound to give written notice to Director General of employee's cessation of employment – Effect of – Income Tax Act, 1967, ss. 83(3) & 107(4).

The appellant employed one S. from whom income tax amounting to $12,101.85 was due and payable. S. ceased employment with the appellant on December 7, 1975. The respondent claimed that the appellant had failed to give a written notice to the Director General of Inland Revenue that it was about to cease to employ S., as required by section 83(3) of the Income Tax Act 1967. The respondent contended that by reason of the failure of the appellant the appellant became liable to pay the income tax of $12,101.85 due from S. The respondent brought action in the Sessions Court to recover the sum from the appellant. Summary judgment was given to the respondent. Hence this appeal by the appellant.

At the hearing of the appeal, counsel for the appellant submitted that the learned President should not have given judgment for the plaintiffs because there was evidence before him showing that notice was given before cessation.

Held, allowing the appeal: (1) section 83(3) applies to a case where an employee resigns on his own as well as to a case in which the employer decides to terminate the employment of an employee. Sub-section (3) of section 83 should be read together with the proviso which immediately follows the sub-section, and the sub-section when so read means that if for any good reason it is not possible for the employer to give the notice not less than one month before the cessation of employment, *e.g.*, because the employee gives less than one month's notice of resignation, the employer is all the same required to give the notice though less than one month from the cessation;

(2) in his Grounds of Decision the President of the Sessions Court did not state whether he took into consideration Exhibits MA-1, MA-2 and MA-3, or what influence he drew from them. Certain issues (as outlined in detail in the judgment) have to be tried and therefore the summary judgment should be set aside and this case be sent back to the Sessions Court for trial of the issues;

(3) in an action brought against an employer to recover tax of his employee where the employer has failed to comply with section 83(3) in respect of that employee, it must be pleaded and shown that the tax cannot be recovered from the employee by reason of that failure. In the present case there was no allegation in the Statement of Claim that S.'s tax could not be recovered from him by reason of the appellant's failure to comply with section 83(3);

(4) costs should be given to the appellant in any event.

CIVIL APPEAL.

A. Kanesalingam for the appellant/defendant.
Suriyadi bin Halim Omar (Senior Federal Counsel) for the respondent/plaintiff.

Cur. Adv. Vult.

Wan Hamzah J.: The defendant in the Kuala Lumpur Sessions Court Civil Action No. 940/1981 (appellant in this appeal) employed one S. Income tax amounting to $12,101.85 was due from and payable by S. He ceased employment with the defendant on December 7, 1975. The plaintiff (respondent in this appeal) alleged that the defendant had failed to give a written notice to the Director General of Inland Revenue that it was about to cease to employ S., as required by section 83(3) of the Income Tax Act. The plaintiff contended that by reason of the failure of the defendant

to comply with section 83(3), under section 107(4) the defendant became liable to pay the income tax of $12,101.85 due from S. Therefore the plaintiff brought the action in the Sessions Court to recover the said sum from the defendant. The pleaded case of the defendant was that S. resigned on his own accord on December 7, 1975 after having given notice of resignation as late as on November 28, 1975. It was contended by the defendant as follows:-

"Section 83(3) of the Income Tax Act requiring 30 days prior notice to be given to the Director General by the employer applies only when the employer ceases to employ an individual and does not apply when an individual resigns without giving more than 30 days notice and the Defendant will say that in this instance the Defendant had no knowledge at all prior to November 28, 1975 that the said S. was leaving their employ on December 7, 1975."

It was further contended by the defendant that section 107(4) does not apply in this case as it was not the employer who was about to cease to employ under section 83(3). The plaintiff applied to the Sessions Court for liberty to sign final judgment and the Sessions Court gave summary judgment for the plaintiff. Hence this appeal by the defendant.

Section 83(3) reads as follows:—

"Where an employer is about to cease to employ an individual who is or is likely to be chargeable to tax in respect of income in respect of gains or profits from the employment, the employer shall not less than one month before the cessation give written notice thereof to the Director General stating the full name and address of the individual and the expected date of cessation:

Provided that, where he is satisfied that it is reasonable to do so in the circumstances, the Director General may accept for the purposes of this subsection a notice given less than one month before the cessation or a notice given on or after the cessation."

In my judgment, section 83(3) applies to a case where an employee resigns on his own as well as to a case in which the employer decides to terminate the employment of an employee. When an employee properly tenders resignation from employment the employer will thereby cease to employ him, and therefore under section 83(3) the employer is required to give the notice to the Director General. Sub-section (3) of section 83 should be read together with the proviso which immediately follows the sub-section, and in my judgment, the sub-section when so read means that if for any good reason it is not possible for the employer to give the notice not less than one month before the cessation of employment, *e.g.*, because the employee gives less than one month's notice of resignation, the employer is all the same required to give the notice though less than one month from the cessation.

At the hearing of this appeal it was submitted by counsel for the defendant that the learned President should not have given judgment for the plaintiff because there was evidence before him showing that notice was given before the cessation. Counsel for the defendant referred to Exhibit MA-1 attached to the affidavit of the Inland Revenue Department Examiner dated November 6, 1981. Exhibit MA-1 was a letter from the Inland Revenue Department to the defendant in which there is a reference to the defendant's notification of the cessation of S.'s employment. It was submitted that since Exhibit MA-1 was dated December 10, 1975 the notification must have been made not later than December 7, 1975, and that the President of the Sessions Court should have drawn such inference from Exhibit MA-1. The Senior Federal Counsel for the plaintiff referred to Exhibit MA-2 attached to the same affidavit, which was a letter written by S. in which he stated that before he resigned on December 7, 1975 the defendant had held back two months' salary. The Senior Federal Counsel also referred to Exhibit MA-3 attached to the same affidavit in which S. stated that his salary had been kept back for several months for the purposes of settling his dues to the Inland Revenue Department, and it was submitted by the Senior Federal Counsel that the inference to be drawn from the facts stated in these two letters is that for some months the Defendant had known of S.'s intended resignation and for that reason had taken steps to hold back his salary in order to settle his income tax. It was therefore submitted that under section 83(3) the defendant had to give the notice to the Director General not less than one month before the cessation. Unfortunately in his Grounds of Decision the President of the Sessions Court did not state whether he took into consideration Exhibits MA-1, MA-2 and MA-3, or what inference he drew from them. I find that there are the following issues which should be determined by the President of the Sessions Court:—

(a) What was the date on which the Defendant first came to know of S.'s intended resignation.

(b) Depending on the answer to question (a), whether the Defendant was required to give

notice of not less than one month before the cessation or notice of less than one month.

(c) What was the date on which the Defendant gave the notice.

(d) Depending on the answers to questions (b) and (c), whether the Defendant had failed to comply with section 83(3).

The above issues have to be tried, and I therefore order that the summary judgment be set aside and that this case be sent back to the Sessions Court for trial of the issues.

There is another reason why the summary judgment should be set aside. Section 107(4) provides –

"An employer who fails to comply with section 83(2), (3), (4) or (5) or this section with respect to an employee of his shall be liable, in the case of a failure to comply with section 83(2), (3), (4) or (5), to pay the full amount of tax which by reason of his failure cannot be recovered from the employee ... ."

The liability of the employer arises if –

(i) the employer fails to comply with section 83(3), and

(ii) by reason of that failure the tax cannot be recovered from the employee.

In an action brought against an employer to recover tax of his employee where the employer has failed to comply with section 83(3) in respect of that employee, it must be pleaded and shown that the tax cannot be recovered from the employee by reason of that failure. In the present case there is no allegation in the Statement of Claim that S.'s tax cannot be recovered from him by reason of the defendant's failure to comply with section 83(3).

The appeal is allowed. Costs to the defendant (appellant) in any event.

Appeal allowed.

Solicitors: *Kanesulingam & Co.*

UNIVERSITY OF MALAYA v. LEE MING CHONG

[A.C.J. (Wan Hamzah S.C.J.) June 18, 1985]

[Kuala Lumpur – Civil Appeal No. 2 of 1977]

Contract – Scholarship agreement – To serve University upon return – "Service" distinguished from "appointment" – Whether breach – Whether liable for damages – Contracts Act 1950, s.4.

University of Malaya – Scholarship agreement – To serve University upon return – Notice to terminate service at end of initial contract – Whether breach.

In 1964 the University of Malaya ("the University") appointed Lee Ming Chong ("Lee") to a scholarship offered by the Canadian government under the Colombo Plan, to pursue a course of study in Canada for the degree of Master of Business Administration and Accounting. A scholarship agreement was entered into on July 26, 1964 between Lee and the University. There were also two sureties for Lee. The agreement provided *inter alia*, that if required by the University, Lee upon his return will serve the University for a period of not less than five years from the date of his first appointment and a breach of this term without the consent of the University will render Lee and his sureties liable to pay the University on demand a sum of $5000.

On his return, Lee was appointed Assistant Lecturer in the Faculty of Economics and Administration on June 6, 1966; this service contract was to expire on January 1, 1969. In a letter by the University dated July 9, 1968, Lee was promoted to Lecturer and confirmed in his appointment as Lecturer in the Department of Economics and Administration with effect from February 1, 1969. Lee declined the offer and gave notice of his intention to terminate his service with the University at the end of his initial contract period on January 1, 1969 in a letter to the University dated October 18, 1968. The University then demanded that the sum of $5000 be paid in accordance with the scholarship agreement as Lee had only been in its service for 2½ years and that he was leaving the University without its consent.

The University brought an action in the Sessions Court against Lee claiming the sum of $5000 for his breach of undertaking in the scholarship agreement to serve the University for a period of not less than five years. In his Statement of Defence, Lee contended, *inter alia*, that:

(1) the University entered into the scholarship agreement as agent on behalf of the Canadian Government and therefore the University itself could not enforce it;

(2) the scholarship agreement was void as it was made without consideration; and

(3) he had completely fulfilled or performed the scholarship agreement, having entered into the service agreement.

Its claim was dismissed and the University appealed.